IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6608 OF 2004

The Upper India Couper Paper
Mills Co.Ltd. ...Petitioners

Versus

M/s.Mangaldas & Sons ...Respondents

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Mr.P.P.Prabhu for Petitioners.

Mr.A.S.Uraizee for Respondents.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 12, 2004.

P.C.

1. Heard Counsel appearing for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.Uraizee waives notice for Respondents.

3. As short question is involved, the matter is heard for final disposal forthwith, by consent.

4. The only question that needs to be

examined in the present Petition is: whether the Trial Court was justified in declining the request of the Petitioners/Defendants to allow them to continue the cross-examination by confronting the Respondents/Plaintiffs witness with documents without furnishing advance copies thereof to the concerned witness. The Trial Court has rejected that request on the reasoning that in view of the provisions contained in Order VIII Rule 1-A of the Code of Civil Procedure, 1908, the Petitioners/Defendants were obliged to disclose those documents in the written statement and also furnish advance copies thereof to the Respondents/Plaintiffs. The grievance made before this Court is that the Petitioners/Defendants were not using the said documents in support of their defence, but only for the limited purpose of confronting the Respondents' witness during the cross-examination and if it is so, it was not necessary for the Petitioners to furnish advance copies of such documents to the Respondents/Plaintiffs' witness.

5. Learned Counsel for the Petitioners/Defendants has made a categorical

statement before this Court that the documents in question will not be utilised or pressed into service on behalf of the Petitioners/Defendants in support of their defence and will be used only for the limited purpose of confronting the Respondents/Plaintiffs' witness during the cross-examination. On the basis of this statement made, I shall proceed to examine the correctness of the submission made on behalf of the Petitioners.

6. Before I proceed to analyse the provisions of Order VIII Rule 1-A of the Code of Civil Procedure, it will be appropriate to reproduce the same, which reads thus :

> **"O.8, Rule 1-A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.**-(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.
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> (2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

> (3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.
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> (4) Nothing in this rule shall apply to documents-
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> (a) produced for the cross-examination of the plaintiff's witnesses, or
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> (b) handed over to a witness merely to refresh his memory."

7. On plain language of this provision, it is amply clear that if the Defendant is relying upon any document in his possession or power, "in support of his defence", he is obliged to enter such document in a list, and to produce it in Court when the written statement is presented by him, and simultaneously deliver the document and a copy thereof, to be filed with the written statement. Clause (3) postulates that if the document is not so produced, even such document can be received in evidence on behalf of the Defendant at the hearing of the Suit "with the leave of the Court". However, as in the present case, if the Defendant was using any document, not already disclosed even if it was in his possession or power, only to

confront the Plaintiff's witness during the cross-examination, it will not be obligatory for the Defendant to furnish advance copy of such document. This position is reinforced by the expansive language of Clause (4) of Rule 1-A. It provides that "nothing in this Rule" shall apply to the document produced for the cross-examination of the Plaintiff's witness.

8. Such provision has been made so as to ensure that the potency or effectiveness of cross-examination of confronting the witness is not whittled. In other words, if the document was furnished in advance there is always a possibility of witness modulating his version. If that happens, the efficacy of cross-examination is bound to be affected. As is contended before this Court, the Petitioners/Defendants are wanting the subject documents to be produced for the limited purpose during the cross-examination to confront the Plaintiffs' witness. The Petitioners are, therefore, justified in contending that the Petitioners were not obliged to furnish advance copies thereof to the Plaintiffs' witness.

9. As mentioned earlier, this Petition succeeds mainly because of the statement made on behalf of the Petitioners before this Court that the subject documents will be used by the Petitioners/Defendants only for the purposes of confronting the Plaintiffs' witness during the cross-examination and not in support of their defence.

10. Petition therefore succeeds with the above observations. Impugned order is set-aside and instead, the application preferred by the Petitioners Exhibit 17 is allowed on the aforesaid terms. No order as to costs.

11. All concerned to act on the zerox copy of this order, duly authenticated by the Sheristedar of this Court.

A.M.KHANWILKAR, J.